

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Section 73.3555(e)	)	MB Docket No. 13-236
of the Commission's Rules, National	)	
Television Multiple Ownership Rule	)	

To: The Commission

**REPLY TO OPPOSITIONS TO, AND IN SUPPORT OF, PETITION FOR RECONSIDERATION OF ION  
MEDIA NETWORKS, INC. AND TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.**

Pursuant to 47 C.F.R. Section 1.429 of the FCC's rules,<sup>1</sup> Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys, hereby submits this Reply to Oppositions to, and in support of, the Petition for Reconsideration<sup>2</sup> filed by ION Media Networks, Inc. and Trinity Christian Center of Santa Ana, Inc. (collectively, "Petitioners") seeking reconsideration of the FCC's *UHF Discount Order*.<sup>3</sup> Sinclair agrees with Petitioners that "the FCC's decision to eliminate the UHF Discount without changing the national multiple ownership audience reach cap ("National Cap") is an unprecedented, unjustifiable, and unlawful tightening of the FCC's ownership rules."<sup>4</sup> We believe the Commission erred in eliminating the UHF Discount without reviewing whether the National Cap remains in the public interest, and in so doing, arbitrarily tightening the National

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<sup>1</sup> Sinclair understands the Commission's rules permit all interested parties to submit replies to oppositions and in support of petitions for reconsiderations of general rulemaking proceedings. In any event, Sinclair has an interest in this proceeding and, to the extent necessary, requests that the Commission accept and consider this submission as informal comments.

<sup>2</sup> *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Petition for Reconsideration of ION Media Networks, Inc. and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236 (filed Nov. 23, 2016) (the "Petition").

<sup>3</sup> See *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Report and Order, 31 FCC Rcd. 10213 (2016) (the "*UHF Order*"); see also 47 C.F.R. §73.3555(e)(2)(i) (the "UHF Discount").

<sup>4</sup> Petition at 3.

Cap without review of the underlying rule.<sup>5</sup> Consequently, the FCC should reconsider the *UHF Order* and reverse its decision to eliminate the UHF Discount.

Further, if the Commission determines to conduct a review of the National Cap, Sinclair urges the Commission to eliminate the National Cap entirely. As the Commission noted in the *Quadrennial Review Order*—yet entirely failed to consider in the *UHF Order*<sup>6</sup>—television stations face increased national competition from a host of new services, including satellite companies, cable networks, OTT providers, and direct subscription services.<sup>7</sup> The National Cap is simply no longer justified in today’s media environment.

### **Background**

On September 26, 2013, the FCC issued a Notice of Proposed Rulemaking requesting comments on its rules related to the maximum audience reach for television broadcast licensees.<sup>8</sup>

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<sup>5</sup> *Id.* at 4 (Petitioners correctly observed that “the record in this proceeding included no evidence that a tightening of the national audience reach cap was in order.”); *see also UHF Order*, Dissenting Statement of Ajit Pai (“*UHF Order*, Pai Dissent”) (“In this Order, the Commission votes to substantially tighten the national audience reach cap (‘national cap’), which restricts the percentage of households in the United States that a single company can serve through commercial television broadcast stations.”).

<sup>6</sup> *UHF Order*, Pai Dissent (“So we are now facing a 39% national cap that has not been adjusted or reviewed for a dozen years. During that time, the video industry has undergone revolutionary change. In particular, the rise of over-the-top video has transformed the video marketplace. For instance, Netflix, YouTube, Amazon, and Hulu all did not offer Internet video when the national cap was set at 39%.”).

<sup>7</sup> 2014 *Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Report and Order, 31 FCC Rcd 9864 (2016) (“*Quadrennial Review Order*”) ¶ 1 (“We recognize that broadband Internet and other technological advances have changed the ways in which many consumers access entertainment, news, and information programming.”).

<sup>8</sup> *See Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, MB Docket No. 13-236, FCC 13-123 (rel. Sept. 26, 2013) (“*NPRM*”).

In response, Sinclair, Petitioners, and other interested parties filed comments urging the Commission not to eliminate the UHF Discount.<sup>9</sup>

The Commission adopted the *UHF Order* in August 2016. In doing so, however, the FCC could not point to any harm in any local market or nationally that would result from continued application of the UHF Discount (notwithstanding that the digital transition on which the decision was based concluded in 2009), nor did it commission any study or attempt to investigate whether such harm existed.<sup>10</sup> It appears that its decision to tighten the national television ownership rules was based solely on the fact that, as a result of the digital transition, UHF stations no longer have less over-the-air coverage than VHF stations, and therefore the discount is outdated. Notably, the Commission did not review whether any other aspects of the National Cap were outdated or show how such change was in the public interest.

### **Discussion**

#### **1. The Commission has the right and obligation to review its decision to eliminate the UHF Discount.**

Sinclair disagrees with the comments filed in opposition to the Petition,<sup>11</sup> which allege that the Commission must dismiss the Petition on procedural grounds. The Commission's rules

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<sup>9</sup> See, e.g., *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Comments of Sinclair Broadcast Group, Inc. (filed Dec. 16, 2013) ("Sinclair Comments")

<sup>10</sup> See *UHF Order*, Pai Dissent ("[I]t has been over seven years since the completion of the digital television transition. And during those seven years when the UHF discount has been on the books, is there any evidence that the national cap has been insufficiently stringent? Is there any indication that any of the core objectives of the Commission's media ownership policies—competition, diversity, and localism—have been harmed? Tellingly, the Commission is unable to point to any such evidence.").

<sup>11</sup> Opposition of American Cable Association ("ACA") (filed Jan. 10, 2016); Opposition of Free Press *et al.* (filed Jan. 10, 2016) ("Free Press", and together with ACA, "Opposition Commenters").

only *permit* dismissal of petitions in certain circumstances that are not applicable here.<sup>12</sup>

Opposition Petitioners claim that the Commission has fully considered and rejected every argument raised in the Petition. However, to support this claim, Opposition Commenters simply reiterate the unsupported conclusions of the Commission. Repeating that the Commission’s decision was “careful” and “deliberate” does not make it so.<sup>13</sup> Any reasoned decision making supporting these conclusions is absent both from the Opposition Comments and the *UHF Order* itself.

Opposition Commenters further argue that “[f]ailure to consider the appropriateness of the national ownership cap in considering whether to eliminate the UHF discount is neither a material omission nor a material error.”<sup>14</sup> We disagree. That the Commission explained why it decided to omit any holistic review of the National Cap—i.e., because initiating a new rulemaking at this point would delay elimination of the UHF Discount—does not excuse a material error or omission. The Commission could have included reexamination of the National Cap in the scope of the rulemaking proceeding simultaneously with its examination of the UHF Discount.<sup>15</sup> Moreover, the Commission failed to point to any public interest harm that would result from continuing the UHF Discount while it undertakes review of the National Cap. That

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<sup>12</sup> 47 C.F.R. § 1.429(l) (“Petitions for reconsideration of a Commission action *that plainly do not warrant consideration* by the Commission *may* be dismissed or denied by the relevant bureau(s) or office(s). . . .”) (emphasis added).

<sup>13</sup> ACA Opposition at 2-3 (noting that the Commission “*concluded* that it was not limited in any way by statute in its ability to review any aspect of the [National Cap]” or “rejected arguments to the contrary, *finding* that it did not agree with commenters that eliminating the UHF discount also requires an examination of the [National Cap].”) (emphasis added).

<sup>14</sup> *Id.* at 8.

<sup>15</sup> See *UHF Order*, Pai Dissent (“But had we sought comment on adjusting the national cap in the *Notice* as I requested, we would have had more than enough time to complete that review over the course of the last 35 months. . . . If time is of the essence and delay can’t be tolerated, then why did it take almost three years to complete this rulemaking?”).

these material errors or omissions are a problem of the Commission’s own making highlights exactly why reconsideration is warranted here.<sup>16</sup> Sinclair agrees with Commissioner Pai that “having fiddled with one critical component of the rule—the UHF discount—the FCC can’t obstinately refuse to review another, especially when the Commission affirms that doing so is within its power.”<sup>17</sup>

Further, public interest requires reconsideration of the *UHF Order* because the elimination of the UHF Discount is arbitrary and capricious. The Commission’s failure to reexamine the National Cap or explore whether a VHF discount would be justified in connection with elimination of the UHF Discount are material errors or omissions that warrant the Commission’s reconsideration of its determinations.<sup>18</sup>

**2. The Commission erred in eliminating the UHF Discount without considering the National Cap as a whole to determine whether it remains in the public interest.**

Sinclair agrees with Petitioners that the FCC lacks authority to modify UHF Discount without reviewing the impact that such change will have on the National Cap.<sup>19</sup> The

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<sup>16</sup> *See id.*

<sup>17</sup> *Id.*

<sup>18</sup> Sinclair agrees with Commissioner Pai that “[i]t is undeniable that eliminating the UHF discount has the effect of expanding the scope of the national cap rule. . . . [T]he Commission has refused to review whether the current national cap ownership rule is sound or whether there is a need to make it more stringent, which is precisely what this *Order* does.” *UHF Order*, Pai Dissent; *see also NPRM*, Dissenting Statement of Commissioner Ajit Pai (stating that the FCC should “not modify the UHF discount without simultaneously reviewing the national audience cap,” given their “interdependent relationship.”).

<sup>19</sup> Petition at 3. As it expressed in the Sinclair Comments, Sinclair also believes that the Commission lacks authority to modify the National Cap in any way, including through elimination of the UHF Discount. In enacting the Consolidated Appropriations Act, Congress directed the FCC to set the National Cap to exactly 39% and specifically removed the FCC’s statutorily mandated obligation to periodically review “any rules relating to the 39 percent national audience reach limitation.” Sinclair Comments at 4; *see also* Consolidated Appropriations Act, 2004, H.R. 2673, 108th Cong. § 629 (2004); *Prometheus Radio Project v.*

Commission does not deny that it failed to reexamine the National Cap prior to eliminating the UHF Discount. Instead, the Commission admits in the *UHF Order* that such review was “not within the scope of the *Notice*” and that it chose not to initiate a new rulemaking to “undertake the complex review of the public interest basis for the national cap” because it “would only delay” elimination of the UHF Discount.<sup>20</sup> But that is a problem of the Commission’s own making, and only highlights the fatal flaw the *UHF Order* shares with the Commission’s first attempt to attribute television JSAs: it is an attempt to make a significant change to one part of the rules without reviewing how such change fits into the ownership regime as a whole, and more importantly, whether such change could be justified in the public interest.<sup>21</sup>

The Commission unconvincingly claims that its efforts to eliminate the UHF Discount are distinguishable from its failed attempt to attribute JSAs because the National Cap is not subject to periodic review under Section 202(h) of the Communications Act. But Section 303 of the Communications Act requires that *any* exercise of the Commission’s authority be subject to

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*FCC*, 373 F.3d 372, 395-97 (3rd Cir. 2004); *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2084 (2008). Accordingly, only Congress has the authority to modify the National Cap. In eliminating the UHF Discount, the Commission effectively lowered the audience reach for all broadcasters with the same effect as if it had lowered the National Cap itself. Consequently, by eliminating the UHF Discount the Commission exceeded its authority by circumventing the precise numerical limit that Congress established and undermining Congress’s deliberate balancing of various policy considerations—all the while without any evidence that a tightening of the National Cap was in the public interest.

<sup>20</sup> *UHF Order* ¶ 40.

<sup>21</sup> *Prometheus Radio Project v. FCC*, 824 F.3d 33, 58 (3rd Cir. 2016) (“[U]nless the Commission determines that the preexisting ownership rules are sound, it cannot logically demonstrate that expansion is in the public interest.”); *see also UHF Order*, Dissenting Statement of Commissioner Michael O’Rielly (“Having apparently learned nothing from past efforts to prematurely change attribution rules for JSAs before the Quadrennial Review of media ownership rules was complete, the Commission is replicating the same flawed approach. This item stubbornly plows ahead in a similar cart-before-the-horse scheme to tinker with a calculation methodology without any consideration of the current validity the overall rule it modifies.”).

“public convenience, interest, or necessity.”<sup>22</sup> Accordingly, the absence of a quadrennial review mandate does not grant the FCC authority to drastically alter the scope of its national ownership rule without undertaking a comprehensive public interest review.

Even accepting the FCC’s argument that the UHF Discount may have outlived its technical basis, the National Cap has no place in today’s video marketplace. Failure to review the continued application of a National Cap to television broadcasters that does not apply to their media competitors is the epitome of arbitrary and capricious decision-making, particularly in today’s vibrant video marketplace.<sup>23</sup>

### **Conclusion**

For the foregoing reasons, Sinclair urges the Commission to reconsider the *UHF Order* and reinstate the UHF Discount until such time as it undertakes and completes a review of whether the National Cap is in the public interest.

Respectfully submitted,

/s/ Miles S. Mason

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<sup>22</sup> 47 U.S.C. § 303; *see also UHF Order*, Pai Dissent (“Moreover, even absent the specific legal requirement to review particular media ownership regulations every four years pursuant to section 202(h) of [the Act], ‘courts have held that the Commission has an affirmative obligation to reexamine its rules over time.’”) (citing *NPRM* ¶ 14).

<sup>23</sup> *See UHF Order*, Pai Dissent.

## CERTIFICATE OF SERVICE

I, Jessica T. Nyman, hereby certify that a copy of the foregoing “REPLY TO OPPOSITIONS TO, AND IN SUPPORT OF, PETITION FOR RECONSIDERATION OF ION MEDIA NETWORKS, INC. AND TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.” was sent via First Class Mail, postage prepaid, this 23<sup>rd</sup> day of January, 2017, to the following:

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